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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 903

BAILEY'S BAKERY, LTD.,
Petitioner,

vs.

CONTINENTAL BAKING COMPANY and LOVE'S BISCUIT AND BREAD COMPANY, LTD.,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAXWELL KEITH
111 Pine Street
San Francisco, California 94111
SHIRO KASHIWA
KASHIWA & KASHIWA
401 Trustco Building
Honolulu, Hawaii 96813
DAVID BERGER
COHEN, SHAPIRO, BERGER, POLISHER AND COHEN
Philadelphia Saving Fund Building
Philadelphia, Pennsylvania 19107
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3080

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that this Court grant a rehearing of its Order of February 24th, 1969, denying the Petition for Writ of Certiorari and that Writ of Certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case as prayed for in the petition docketed herein by petitioner on January 4th, 1969.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Petitioner submits as reasons for granting a rehearing and issuing a writ: 1) that as shown in the paragraphs below intervening circumstances of substantial effect have taken place since the filing of petitioner's Petition for Writ of Certiorari on January 4th, 1969, and 2) that as shown in the paragraphs below that substantial grounds available to petitioner not previously truly presented should be presented so that this court's approval of and encouragement of private enforcement of the anti-trust laws as an *"ever present threat"* to deter anyone contemplating business behavior in violation of the anti-trust laws, *Perma Life Mufflers* v. *International Parts Corp.*, (1968) 392 U.S. 134, will be meaningful and not futile. Continental Baking Company and its parent International Telephone and Telegraph Corporation, as shown hereafter, has made mockery of this court's attempt to encourage private enforcement of anti-trust laws. It blows hot and cold depending on its conflicting conglomerate purposes.

I.

Trial Court by a Decision Dated January 16th, 1969, in Effect, Reversed Itself on Question of Availability of Damage Claim for Clayton 7 Violation; Conglomerate I T & T Cannot Take Inconsistent Positions in United States Courts and Make Mockery of Justice.

After petitioner Bailey's Bakery, Ltd. filed on January 4th, 1969, its Petition for Writ of Certiorari in this cause on *January 16th, 1969,* the same district judge Honorable Martin Pence who presided in this cause in the trial court, filed a written opinion (yet unreported) in Civil No. 2754, in the United States District Court of Hawaii in a case entitled International Telephone and Telegraph

Corp. v. General Telephone and Electric Corporation and Hawaiian Telephone Co. and reversed its fundamental holding on the legal effect of an unlawful merger under Clayton 7, thus reversing itself on one of the main contentions of error made by petitioner. The decision of Judge Pence dated January 16th, 1969, was received in early February as an advance sheet in 1969 CCH Trade Cases Sec. 72691 and it could not have been called to this Court's attention in petitioner's Petition for Writ of Certiorari filed herein. A copy of the said January 16th, 1969 decision of Judge Pence is attached at the end hereof as Appendix G.

Attention is also called to the fact that on June 12th, 1968, the same International Telephone and Telegraph Co. (hereafter referred to as IT&T) and respondent Continental Baking Co. entered into a merger agreement under which Continental Baking Company would become a wholly owned subsidiary of IT&T. A copy of a page from Standard and Poor's Corporations "*Listed Stock Reports*", dated July 3rd, 1968, is attached hereto as Appendix H showing the above merger agreement. The agreement has been consummated. The said decision clearly shows that IT&T and Continental Baking Company parent and subsidiary are in strange opposite positions. In this case IT&T defends a bakery merger but it attacks General Telephone and Electric Company's merger with Hawaiian Telephone Company. Conglomerates may be permitted to engage in strange and irreconcilable conflicting business relationships but a conglomerate parent and subsidiary should not and cannot be permitted to represent to two different federal courts (one being this Supreme Court) two opposite inconsistent legal positions. Their actions make mockery of justice.

IT&T on October 18th, 1967, sued General Telephone and Electric Corporation and Hawaiian Telephone Co. in the United States District Court of Hawaii alleging that the merger of General Telephone and Hawaiian Telephone was illegal under Clayton 7 and sought injunctive relief in that by said merger IT&T will not be able to sell telephones and other equipment to Hawaiian Telephone Co. Judge Pence in his decision of September 21st, 1964, in this cause, Appendix B attached to petitioner's Petition for a Writ of Certiorari (pages 2 to 33) held that an illegal merger under Clayton 7 was only a momentary wrong, as follows:

> "The prohibitory sanctions of Clayton 7 *are triggered to explode by and at the moment of acquisition.* That, after the moment of acquisition, subsequent business practices do injure competitors in that market does not, because of subsequent injurious acts, give rise to a claim for treble damages under Clayton 7." (page 18 Appendix B). (emphasis ours)

But the same Judge Pence in his decision of January 16th, 1969, in International Telephone and Telegraph Corporation v. General Telephone and Electric Corporation and Hawaiian Telephone Co. viewed the same wrongful violation of Clayton 7 as a *continuing wrong* as follows:

> "The prospective language of Clayton 7, in combination with and when construed in the light of the Supreme Court's opinion in *du Pont, bring such acquisitions into the ambit of continuing violation. Accordingly, the instant acquisitions may be challenged at anytime within (and at least for four years after) the span of such alleged violation.*" (emphasis ours)

Therefore the "instant" and momentary concept has been discarded by the trial court. This court should follow the continuing violation rule and furthermore Judge Pence in his decision in the IT&T case in encouraging private enforcement of the antitrust laws stated as follows:

> "The force of the policy favoring private enforcement of the antitrust laws was again emphasized by the Supreme Court in Perma Life Mufflers v. International Parts Corp., (1968 Trade Cases Sec. 72486) 392 U.S. 134, 139 (1968) when it stated:
>
> > '* * * the purposes of the antitrust laws are best served by insuring that the private action will be an *ever present threat* to deter anyone contemplating business behavior in violation of the antitrust laws.' " (emphasis ours) (See Appendix G)

Perma Life did not hold that the said *"ever present threat"* policy did not apply to Clayton 7 violations. It covered all violations including violations of Clayton 7.

It is submitted that Judge Pence below corrected himself of his error in the Bailey's Bakery case at the request of International Telephone and Telegraph Corp., parent corporation of Continental Baking Company which is also the parent corporation of Love's Biscuit and Bread Co., Ltd.

Is it proper for conglomerate International Telephone and Telegraph Corp. to blow hot and cold, depending on what its ultimate purpose is? Simple principles of legal honesty should apply to conglomerates like IT&T. Legal principles should not be conglomerated, depending on the conglomerate's position in court.

II.

That Courts Below Are Divided on Whether Treble Damage Actions May Be Maintained for Violation of Clayton 7; This Situation Must Be Corrected.

Upon a careful reading of petitioner's Petition for a Writ of Certiorari, it is not clear that Count I of the second amended complaint filed in the trial court based solely on violation of Clayton 7 was completely dismissed. See Ap-

pendix B, page 33, attached to Petition for Writ of Certiorari where the trial court clearly held

"Defendants' motion to dismiss Count I is granted."

In other words the trial court held that a treble damage claim may not be based on a violation of Clayton 7.

The lower federal courts do not all agree on this very important question, that is to say, there is a division of authorities on the question whether a treble damage suit may be based on a violation of Clayton 7. There is an uncertainty in this field as Justice Bell of the 5th circuit stated in *Dailey* v. *Quality School Plans, Inc.*, (C.C.A. 5) (1967) 380 F.2d 484, as follows:

> "In addition, Cowles urges that no cause of action lies for damages on the basis of a violation of § 7 of the Clayton Act. 15 USCA § 18. This is a question concerning which some uncertainty has crept into the law through the decisions. The better view to us is that § 7 is included in the term 'antitrust laws' as that term is used in § 4 of the Act. The Third Circuit has so stated although this particular argument was apparently not made. *New Jersey Wood Finishing Company* v. *Minnesota Mining and Manufacturing Company* [1964 Trade Cases ¶ 71,110], 3 Cir., 1964, 332 F.2d 346, aff'd *sub nom Minnesota Mining and Manufacturing Company* v. *New Jersey Wood Finishing Company* [1965 Trade Cases ¶ 71,449], 1965, 381 U.S. 311, 85 S. Ct. 1473, 14 L. Ed. 2d 405. See also *Julius M. Ames Co.* v. *Bostitch, Inc.* [1965 Trade Cases ¶ 71,397], S. D. N. Y., 1965, 240 F. Supp. 521, where the argument was rejected; and Note, 64 Col. Law Review, 597 (1964). There are authorities to the contrary. *Gottesman* v. *General Motors Corporation* [1963 Trade Cases ¶ 70,900], S. D. N. Y., 1963, 221 F. Supp. 488, cert. den., 379 U.S. 882, 85 S. Ct. 144, 13 L. Ed. 2d 88; *Bailey's Bakery, Ltd.* v. *Continental Packaging Company*, D. Hawaii, 1964, 235 F. Supp. 705; *Highland Supply Corporation* v. *Reynolds Metal Co.* [1964 Trade

Cases ¶ 71,023], 8 Cir., 1964, 327 F.2d 725, in footnote 3, and on remand see *Highland Supply Corporation* v. *Reynolds Metal Company* [1965 Trade Cases ¶ 71,380], E.D. Mo., 1965, 245 F. Supp. 510. We see no escape from the logic that § 7 of the Clayton Act is an anti-trust statute within the scope and meaning of § 4 of the Act and so hold."

The uncertainty referred to by Justice Ball should be immediately clarified. This court has granted certiorari in private treble damage suits, where rulings below have threatened the effectiveness of private action as a vital means of enforcing the anti-trust policy of the United States. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, (1968) 392 U.S. 134, 88 S. Ct. 1981, 1983. The present increase of mergers is a matter of national concern. Lately public reaction is so against concentration by merger that even Congress is known to have the problem under consideration.

This is the first case before this court which squarely presents the issue. Bailey's Bakery, a small corporation, with annual sales of only $500,000 per annum challenges a merger of Love's Bakery and Continental Baking Co., having a total sales of a half billion dollars. While the case is pending, Continental was merged into IT&T, a four billion dollar conglomerate. Does a small organization have any more chance in this country if this court, while encouraging private suits and saying that it will grant certiorari in cases where effectiveness of private action is threatened, refuses certiorari in a case where a fundamental question whether a small business annihilated by a merger in violation of Clayton 7 may file a treble damage suit?

III.

Plight of the Small American Bakery, a Fight Between the Majors and Small Independents, Bailey's Was Annihilated.

Continental and Love's, Hawaii, filed in this court their reply to petitioner's Petition for Writ of Certiorari on or about February 5th, 1969. It states on page 3 thereof that "None of the management personnel and none of the policies of Love's, Hawaii, were changed". Petitioner absolutely differs but instead of going into an answering argument states that the failure of Bailey's Bakery, Ltd., is due to the very causes brought out by Judge Fox of the United States District Court for the Western District of Michigan, Southern Division in a price fixing case in which Continental Baking Company was a party defendant. The case is entitled *United States* v. *American Bakeries, Continental Baking Co., Dutch Treat Bakers, Inc. et al.,* (June 4th, 1968) 284 F.Supp. 864. At pages 869-870 of said opinion the court describes the plight of the typical small American independent bakery like petitioner Bailey's Bakery, Ltd. The court stated:

> "In applying all the factors mentioned in this case, the nature of the bakery industry in Michigan and elsewhere must be understood. The key feature of the Michigan market is the presence of four majors and eight independents. *This is important because of the disparity in size between the majors and the independents.* For example, the net worth of Campbell Taggart, one of the majors is $80,000,000; the total net worth of the eight independents is $6,000,000, or approximately 6½% of the net worth of a single major company. It now becomes clear why both attorneys from the independents and the Government concluded that the independents do not control the price of bread and bakery products in Michigan.

Testimony contained in The Report of the Committee on the Judiciary, made by its Subcommittee on Antitrust and Monopoly, 86th Cong. 2d Sess. 1960, entitled Administered Prices—Bread (hereinafter cited as Report), reveals some startling information. The Committee concluded at page 91 that the majors have at one time or another employed seven forms of discrimination in the bread industry: '(1) *provision of free bread and free fixtures;* (2) *stales "clobbering";* (3) *discounts and allowances;* (4) *use of secondary loaves in fighting brands;* (5) *money "over, under and through" the table;* (6) *selling heavier or better loaves of bread at the same price; and* (7) *product discrimination.* The effects of these forms of discrimination on the independent baker whose market is invaded by the large firms *have been a recurring theme through every account of the practices in the bread industry.*

'In addition, however, these discriminating practices serve as highly effective tools for the Big Eight in still another way. *They tend to prevent entry into monopolized markets by reducing expectations of potential profits in the monopolized market. The independent firm knows that by using these forms of discrimination, the Big Eight can destroy the independent by draining away his meager capital.'*

An example of the plight of the independent is the case of Schafer Bakeries, Inc. On October 13, 1960, Judge Ralph Freeman of the Eastern District of Michigan signed an order under Section 236 dismissing the proceedings of a 77B bankruptcy action. Net sales from that date until now have been $80,000,000; profits were $258,000, which is slightly more than one-fourth of one per cent of sales, a very thin survival margin. And if any one of the seven discriminatory practices is effectively employed, the effect on Schafer could be fatal.

The Report makes it clear that wherever major companies in multiples invade a local market they

control the price of bakery products, and the decision of the independents is whether to follow the lead of the majors or remain in a steady position of their own choice. *Failure to follow the lead of the major companies has often been extremely costly to independents, as the Report notes at pages 166-9.*

The expectation of the independents must be that if they fail to follow the price leader, the leader can and will rescind the increase before they can gain any significant benefit. However, the almost complete absence of rescission of price increases indicates that the independent bakeries are almost unanimous in their belief that in the local bread market the space of time between the increase is not sufficient to derive benefits by the independent remaining at his price level. Also, price-followership is often the simplest course of action *to avert the onslaught from majors of the practices mentioned supra.*

The significance of this information is in determining whether the public interest will be served by accepting the nolo contendere pleas, making it difficult for the State of Michigan to pursue its private treble damage action, but allowing the independents to continue in business without litigation expenses which may drive them out of business.

If any or all of the independents were to go out of business, the public interest would probably be damaged much more than if Michigan were not allowed the benefits of Section 5. 'The West Coast Story: A Case Study,' found on page 170 of the Report, illustrates how the price zooms once majors control the markets. Between 1953 and 1960, *'west coast prices have increased nearly twice as much as the national average.' This unusually sharp increase in price was accompanied by an extensive merger acquisition movement on the west coast.* The pattern of acquisitions is remarkably similar to the pattern of price increases. 'In no other region of the country is there to be found such a striking identity of price changes by competing

companies, both as to timing and as to the magnitudes of the changes themselves . . .'

'It is not unreasonable to suggest that the prevalence of a common course of action in raising prices in west coast markets may be closely related to the best level of concentration which has developed in those markets, *as well as to an acute awareness on the part of local independent bakers of their vulnerability to retaliation for any departure from such a course of action.* Indeed, there does not appear to be any other reasonable explanation for the extent to which west coast bread prices have risen above those in the rest of the Nation.' Report, at 178.

Thus, if the independents in Michigan are driven out, the same results as on the west coast may accrue. And I find the financial position of the independents precarious enough to make an extensive antitrust suit likely to drive one or more of them out of business. Other factors arguing for acceptance of the independents' nolo pleas are the fact that they have not been repeated violators, they are small, and not particularly powerful. These considerations, combined with the damage of competition should any of these defendants be driven out of business by expensive litigation, cause me to accept the independents' pleas of nolo contendere.

As to the majors, an entirely different situation exists. They are not small or weak, and litigation is not likely to put them out of business. Furthermore, as noted in the Report and evidenced by the cases, each of the majors has been fined on other occasions for antitrust violations.[2] Clearly there is a need for a

2. *U. S.* v. *American Bakeries, et al.*, B. B. 1592, Criminal No. 11676 (S. D. Fla.) April 11, 1961.

American Bakeries, nolo plea and fine of $5,000.
Ward Foods, nolo plea and fine of $5,000.

U. S. v. *Ward Baking Co., et al.*, B. B. 1593, Criminal 11677 (S. D. Fla.) April 11, 1961.

American Bakeries, nolo plea and fine of $6,000.
Ward Foods, nolo plea and fine of $5,000.

stronger deterrent with respect to the majors than has been provided in the past by their numerous nolo contendere pleas and consent judgments. Therefore, the request of the majors to change their pleas is refused." (Emphasis ours)

With relation to the above-listed seven forms of discrimination in the bread industry Bailey's was subjected to much greater discriminations as listed on pages 9, 10 and 13 of the Petition for Writ of Certiorari. Free shelving, thirteen fighting brands instead of one, balloon loaves, kickbacks to restaurants, money rebates to supermarkets, premium prizes, end label price fixing, excessive advertising, misleading advertising and other overreaching acts. How could a small corporation having only $500,000 in gross sales per annum fight back one of the majors in the industry with sales in excess of half a billion dollars? Bailey's officers felt it was useless to fight back. It was

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U. S. v. *Ward Baking Co., et al.*, B. B. 1618, Civil 4735 (S. D. Fla.).

American Bakeries, paid $12,000 damage settlement as to Count I, May 8, 1962; entered a consent judgment as to Count II on September 1, 1965.

Ward Foods, paid $12,000 damage settlement as to Count I; entered a consent judgment as to Count II.

U. S. v. *General Baking Co., et al.*, B. B. 1319, Criminal 12991 (N. D. Okla.) March 11, 1957.

Continental Baking, nolo plea and fine of $10,000.

Campbell Taggart (Rainbo), nolo plea and fine of $2,500.

U. S. v. *Freihofer Baking Co., et al.*, B. B. 572, Criminal 8874, (E. D. Pa.) January 9, 1942.

Continental Baking, nolo plea and fine of $2,000.

Ward Foods, nolo plea and fine of $1,500.

U. S. v. *New England Bakers Assoc., et al.*, B. B. 710, Criminal 1577 (D. Mass.) June 22, 1943.

Continental Baking, nolo plea and fine of $5,000.

Ward Foods, nolo plea and fine of $5,000.

Safeway Stores, Inc. v. *F. T. C.*, 366 F. 2d 795 (C. A. 9, 1966) cert. den. 386 U. S. 932, affirming a price-fixing finding by FTC against Continental Baking.

(Apparently the first three cases in this series arise out of the same fact situation.)

annihilated. The above-mentioned pattern of operation by the majors made it useless for the small bakeries to fight back.

IV.

Entry of Holsum in Market a Foreseeable Intervening Force; Wrongdoer Cannot Blame Intervening Force and Free Itself of Liability.

Much is said by respondents of the entry of Holsum into the market in November, 1961. Petitioner first contends that Holsum entered the market after September, 1961, when Petitioner was already operating below its break-even point. (See page 21 of petitioner's petition for certiorari.) Petitioner was already down and damage had been done.

Furthermore, respondents foresaw that Holsum was going to come into the market when respondents acquired Love's, Hawaii, in May, 1960. See letter of January 29th, 1960, by Judge Steadman to the shareholders of Love's, Hawaii, on page 16 of petition for writ of certiorari. The threat was characterized as a "real" threat and it was one of the reasons why Love's, Hawaii, sold out to respondents.

One need not quote elementary tort law that a foreseeable intervening force does not excuse a wrongdoer of his wrongful acts.

CONCLUSION

It is therefore prayed that a rehearing be granted and a writ of certiorari allowed.

Respectfully submitted,

DAVID BERGER
22nd Floor
Philadelphia Saving Fund Building
Philadelphia, Pennsylvania 19107

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds in Rule 58 of the Rules of this court.

By .....

DAVID BERGER
22nd Floor
Philadelphia Saving Fund Building
Philadelphia, Pennsylvania 19107
Attorney for Petitioner

SHIRO KASHIWA
401 Trustco Building
Honolulu, Hawaii 96813

MAXWELL KEITH
111 Pine Street
San Francisco, California 94111
Of Counsel

APPENDIX G

[¶ 72,691] International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp. and Hawaiian Telephone Co.

In the United States District Court for the District of Hawaii. Civil No. 2754. Filed January 16, 1969.

Memorandum Decision on Plaintiff's Motion to Strike the Second, Third and Fourth Affirmative Defenses of Defendant General Telephone & Electronics Corporation

Pence, D. J.: Plaintiff is suing under Section 16 of the Clayton Act (Title 15 U.S.C. § 26) and Section 11 of Act 190 of the Hawaii Laws of 1961 for injunctive relief from defendants' alleged violations of the federal and state antitrust laws. Defendant General Telephone & Electronics (GT&E) has asserted the doctrines of laches and/or statute of limitations,[1] estoppel,[2] and unclean hands[3] as affirmative defenses to some or all of plaintiff's charges. Plaintiff has moved to strike these defenses as insufficient and immaterial as a matter of law. Plaintiff's motion was granted orally on August 2, 1968, and this is but the formal written decision thereon.

I. *Second Affirmative Defense: Laches and/or Statute of Limitations*

Paragraph 1 of plaintiff's prayer for relief requests that the following acquisitions of GT&E be adjudged violations of Sections 1 and 2 of the Sherman Act (Title 15

1. Second Affirmative Defense, Answer to Amended Complaint and Counterclaim (filed February 20, 1968), paragraphs 31-32.

2. Third Affirmative Defense, Answer, paragraphs 33-52.

3. Fourth Affirmative Defense, Answer, paragraphs 53-67.

U.S.C. §§ 1, 2) and Section 7 of the Clayton Act, as amended (Title 15 U.S.C. § 18):

1. 1950—GT&E acquired the capital stock of Leich Electric Co.;

2. 1954—GT&E acquired the stock or assets of Automatic Electric Company;

3. 1959—GT&E acquired the stock or assets of Lenkurt Electric Co., Inc.; and

4. 1964—GT&E acquired the stock of California Water & Telephone Company, West Coast Telephone Company, The Southwestern States Telephone Company, and Western Utilities Corporation (all referred to as the Western Utilities groups).

Defendant contends "such relief is barred by reason of laches *and* the statute of limitations (Section 4B of the Clayton Act . . .)." (Emphasis added.)[4] Defendant has abandoned this defense insofar as it relates to the 1964 acquisition of the Western Utilities group, which occurred within four (4) years of the filing of this lawsuit (October 18, 1967).[5]

Clayton § 4B[6] provides that any "action under [Clayton] sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued." Since plaintiff initiated this lawsuit solely under Clayton § 16 for injunctive relief, the § 4B statute of limitations applied to Clayton Act actions for money damages is, by its very language, not, per se, applicable to this proceeding.

4. Defendant has abandoned that portion of its pleading relating to § 22 of Act 190 of the Hawaii Laws of 1961, since plaintiff does not maintain that the listed acquisitions in any way violate that Act. (R. T. August 1, 1968 at 104-05.)

5. R. T. August 1, 1968 at 42.

6. Title 15 U. S. C. 15b.

Defendant's second affirmative defense is therefore limited to the equitable doctrine of laches, which, for the purposes of this action, defendant equates to the statute of limitations.

Defendant stated its position in the context of and relies primarily[7] on *Farbenfabriken Bayer, A. G.* v. *Sterling Drug* [1961 Trade Cases ¶ 70,106], 197 F. Supp. 627 (D. N.J. 1961): (*Id.* note 5, *supra.*)

> "When I say laches here, I am talking about laches in the sense of an equitable remedy being linked to a legal right, the equitable remedy being Section 16 linked to a legal right, which is Section 7 of the Clayton Act, and Sections 1 and 2 of the Sherman Act.
>
> "The plaintiff isn't suing for damages. The one thing he is after is an equitable remedy of an injunction, divestiture, some equitable remedy. Now, it's linked to the legal rights given by statute, Clayton 7 and Sherman 1 and 2. Those legal rights in the Antitrust laws, Sherman 1 and 2 and Clayton 7, are subject to Section 4, statute of limitations, Section 4B, four years.
>
> * * *
>
> ". . . [W]hen I say laches now, I am talking about laches which is the four-year period, because it is the statute of limitations of the legal rights upon which they ask for the equitable remedy."

Plaintiff urges that an action for divestiture under the antitrust laws is timely if, at the time of filing, there appears a reasonable likelihood any acquisition will lessen competition, citing *United States* v. *du Pont & Co.* [1957

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7. Defendants have also pointed to *United West Coast Theatres Corp.* v. *South Side Theatres* [1950-1951 TRADE CASES ¶ 62,591], 86 F. Supp. 109 (S. D. Cal. 1949) (defendants counterclaimed for treble damages and injunctive relief under Clayton §§ 4 and 16, and the court applied the state statute of limitations to the prayer for equitable relief), and *Hoopes* v. *Union Oil Co. of California* [1967 TRADE CASES ¶ 71,997], 374 F. 2d 480 (9 Cir. 1967) (a suit for money damages only under Clayton § 4).

Trade Cases ¶ 68,723], 353 U.S. 586 (1957). Plaintiff maintains *du Pont* permits suit whenever "the acquisition threatens to ripen into a prohibited effect."[8] Defendant counters that *du Pont* is distinguishable since it was a government suit and immune from any laches defense. Defendant construes plaintiff's position as conceding that an acquisition which constitued a violation at the time made is subject to attack for laches, arguing that, at most, *du Pont* introduces a fact question (e.g., when the violation occurred) which precludes summary judgment as an alternative to a motion to strike.

Clayton 4B is limited to actions for money damages initiated under Clayton 4 or 4A by private parties or the federal government. Clayton 4B does not in any way specifically curtail or attach limitations to private suits under Clayton 16. If there is any such limitation on private equity proceedings, it can therefore only derive from case law.

Sterling Drug, supra, is the primary authority relied upon by defendant to support its position that the Clayton 4B four year statute of limitations for Clayton 4 actions is by case law transmuted into laches and made applicable to this equitable proceeding under Clayton 16. In that case plaintiff sued on September 28, 1955, for money and injunctive relief as a result of defendant's Sherman 1 violation. A companion opinion found that such violation (an unlawful combination and conspiracy in restraint of trade in pharmaceutical products) had terminated on September 5, 1941. Previously the court had dismissed plaintiff's treble damage claim, leaving only a Clayton 16 claim for injunc-

8. Plaintiff's Reply to Memorandum in Opposition to ITT's Motion to Strike the Second, Third and Fourth Affirmative Defenses (filed June 12, 1968) at page 2, and *du Pont, supra,* at page 597.

tive relief. In granting defendant's motion for summary judgment, the court said:

> "Section 4 of the Clayton Act . . . grants to 'any person * * * injured in his business or property by reason of anything forbidden in the antitrust laws' a right to maintain an action for treble damages. Section 16 of the Act . . . grants an *additional* right to maintain an action for injunctive relief 'against threatened loss or damage.' We are of the opinion that the equitable remedy available under Section 16 is *predicated* upon the legal cause of action created by Section 4. It is essentially an equitable remedy in aid of a legal right created by the statute. (Emphasis added.)
>
> "The statute of limitations, by its express terms, applies only to actions at law and may not be invoked as a defense against a claim exclusively equitable. However, where the equity jurisdiction is invoked in aid of a legal right, or is predicated upon a legal cause of action, equity 'will withhold its remedy if the legal right is barred by the * * * statute of limitations.'" [1961 Trade Cases ¶ 70,106], 197 F. Supp. at 629.[9]

The history of sections 4, 16 and 4B does not permit this court to agree with the conclusion that a Clayton 16 claim "is predicated upon the legal cause of action created by Section 4." Private parties were originally granted the right to seek treble damages by the Sherman Act (passed July 2, 1890), which, however, did not establish the corollary right to injunctive relief. Congress reenacted the substance of the treble damage provision on October 15, 1914 as Section 4 of the Clayton Act. Significantly, Congress at that time made a concomitant expansion of the antitrust laws by giving private parties the right to sue for injunctive relief (Clayton § 16) separate and apart from any right

9. It should be noted that the court initially reached the opposite conclusion. See *Farbenfabriken Bayer, A. G.* v. *Sterling Drug* [1958 TRADE CASES ¶ 68,949], 153 F. Supp. 589, 594 (D. N. J. 1957).

to monetary recovery. It was not until July 7, 1955, that Clayton 4B, which pre-empted application of state statutes of limitation to the federal antitrust laws, was added.

While the right to such injunctive relief to redress antitrust grievances may be said to be "additional" to the right to damages in the sense that it may be conjoined therewith, it may also be an alternative. As the above history manifests, the equitable remedy of § 16 is in no way "predicated upon", incidental to or derived from the legal right of § 4. The two sections expressly create wholly independent remedies, in strikingly similar language. A litigant may pull either trigger of his shotgun independently, or, at his option, he may shoot both barrels together. This is abundantly clear from the instant complaint, in which plaintiff seeks only injunctive relief. No damage claim exists herein on which any equitable remedy could be predicated. Yet defendants have not challenged plaintiff's right to maintain this suit.

In *Sterling Drug* plaintiff originally sought *both* legal and equitable relief, and to support incorporation of the Clayton 4B four year limitations period into a laches defense applied to a Clayton 16 claim the court relied on the general principle that equity withholds its remedy when legal rights are barred. Moreover, the facts of *Sterling Drug* are markedly different from those alleged here. The violation in *Sterling Drug* consisted of a conspiracy among plaintiff's predecessors and the defendant and its predecessors, which included illegal contracts in 1920, 1923 and 1926, all of which terminated on September 5, 1941. The suit was filed in 1955. In contrast, the pleadings herein allege a cause of action growing out of successive and multiple acquisitions continuing to the year suit was brought. The prospective language of Clayton 7, in combination with, and when construed in the light of the Supreme Court's opinion in *du Pont*, bring such acquisitions into the ambit

of a continuing violation. Accordingly, the instant acquisitions may be challenged at any time within (and at least for four years after) the span of such alleged violation.

The Ninth Circuit's statement in *Hoopes, supra,* note 7, at 486, is particularly relevant:

> "Union views appellants' claim too narrowly. The alleged antitrust violation consists of Union's entire course of conduct directed to the establishment and maintenance of exclusive dealing arrangements . . . Acts of Union in furtherance of this purpose, which appellants contend caused them injury and damage, included Union's efforts to prevent appellants from selling or leasing their station free of the exclusive dealing condition. These acts continued until the complaint was filed and thereafter. Thus, appellants' action is not barred even if the invasion of their interests is considered to have been episodic rather than continuous."

The *Sterling Drug* doctrine, as applied, is in direct conflict with and contravenes the meritorious principle that equitable defenses are unavailable to defeat rights which are statutory and/or in furtherance of a strong public policy.[10] The right of private individuals to enforce the antitrust laws is both statutory and advances an important public policy. The rationale of the policy encouraging such private enforcement is to permit private parties to supplement governmental action. Private proceedings inure to the public benefit by eliminating unlawful restraints from interstate commerce. While treble recovery under § 4 provides an incentive or bonus to encourage private litigants to undertake an arduous task, in a suit for equitable relief under Clayton 16 the private plaintiff does not receive any comparable cash benefit. The elimination of an existing violation increases competition, thus benefiting

10. *American Surety Company of New York* v. *Gold,* 375 F. 2d 523, 528 (10 Cir. 1967).

the public and concurrently the private plaintiff. The law does not require that the public undergo continued subjection to antitrust violations when a champion appears, merely because of the passage of time. Antitrust violations do not become sacrosanct with age, and immunized from attack, when the public good dictates the contrary.

The force of the policy favoring private enforcement of the antitrust laws was again emphasized by the Supreme Court in *Perma Life Mufflers* v. *International Parts Corp.*, [1968 Trade Cases ¶ 72,486], 392 U.S. 134, 139 (1968), when it stated:

> ". . . [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement."

If a "morally reprehensible" plaintiff is not precluded from suing, certainly the contemplative, albeit tardy, one should not be subjected to harsher treatment. The private litigant, no less than the government, is entitled to the opportunity to ponder and evaluate the effect of acquisitions, and need not bull ahead indiscriminately to avoid the proscriptive doctrine of laches.

This court views the *du Pont* case as controlling. In that action the government sued in 1949 for alleged Clayton 7 violations resulting from du Pont's 1917-1919 purchase of a 23% interest in General Motors. The Supreme Court

squarely ruled on the question of whether that action was late, holding:

> "The Senate declared the objective of the Clayton Act to be as follows:
>
> "'. . . Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices . . . to arrest the creation of trusts, conspiracies, and monopolies *in their incipiency and before consummation*. . . .' (Italicized in original.)
>
> "'Incipiency' in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. . . . To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." (Footnote omitted.) [1957 Trade Cases ¶ 68,723], 353 U.S. at 597.

Defendant has not advanced any reason why this rule should not be available to private litigants in a like manner—especially in a proceeding such as this which is primarily enforcement. If the congressional intent is accomplished by permitting government action against acquisitions thirty years following consummation, then permitting comparable private actions advances the same purpose.

II. *Third Affirmative Defense: Estoppel*

Plaintiff has prayed that the court find GT&E's acquisition of (1) California Water & Telephone Company, The Southwestern States Telephone Company, and the West Coast Telephone Company in violation of §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act, and (2) Hawaiian Telephone Company in violation of the above listed provisions of the federal law and §§ 2, 5 and 7 of Act 190 of

Hawaii Laws of 1961. Defendant answers that plaintiff had advance actual or constructive notice of all such acquisitions, did not oppose such acquisitions before the appropriate state regulatory agencies, and is accordingly estopped from challenging such mergers in this forum. Plaintiff counters with the contention that the equitable doctrine of estoppel is not available as a matter of law in defense of private antitrust actions. Defendant replies that Clayton 16 provides that private litigants shall be entitled to injunctive relief "under the same conditions and principles" as in "courts of equity", which incorporates the defense of estoppel into the antitrust laws. Plaintiff responds that Clayton 16 merely provides when injunctions shall issue, but does not affirmatively provide antitrust defendants with all possible equitable defenses. The court is unaware of any reported decision considering this question.

Plaintiff's motion to strike defendant's third affirmative defense is granted. Even accepting (without affirming) defendant's general position that the language of Clayton 16 incorporates all equitable defenses into the antitrust laws, nevertheless the specific equitable principle that estoppel is precluded as a bar to statutory rights, or rights advancing a strong public policy is overriding and controlling here. In *American Surety Co. of New York* v. *Gold*, *supra*, at 528, an action against an insurer to recover punitive damages levied against the insured in a personal injury case, the insurer acknowledged responsibility for the compensatory damages, but denied liability for the punitive award, asserting such recovery was contrary to the pertinent public policy. The Tenth Circuit stated the general rule:

> " 'The doctrines of estoppel and waiver do not in general apply in transactions that are forbidden by statute or that are contrary to public policy.' " 375 F.2d at 528.

Defendant's third affirmative defense is gored by each horn of this principle. The challenged acquisitions are illegal only if forbidden by federal and state statute, and, as noted above, the public policy favors private enforcement of the antitrust laws.[11] On both grounds, therefore, this defense must fall.

The same result is reached under Hawaii law. In order to minimize judicial construction of the statutory language by reference to an existing body of case law, the Hawaii antitrust statute substantially, almost verbatim, incorporated the federal statutes into the state act.[12] Accordingly, defendant's defense of estoppel to plaintiff's state law claim is similarly stricken down.

III. *Fourth Affirmative Defense: Unclean Hands*

Defendant asserts that plaintiff (a) manufactures and sells communication equipment to foreign telephone companies, including Puerto Rico and the Virgin Islands; (b) acquired much of its telecommunication manufacturing capacity through illegal mergers; (c) has attempted to acquire domestic telephone operating companies; and (d) has acquired numerous companies not engaged in the communications industry—all of which constitutes unclean hands. Plaintiff insists such a defense is not available to antitrust defendants as a matter of law.

Although this defense is precluded in Clayton 4 damage actions,[13] whether or not it may be a defense in

11. See *Perma Life Mufflers, supra.*

12. Laws of Hawaii, Chapter 205A, §§ 1, 2.

13. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons* [1950-1951 TRADE CASES ¶ 62,737], 340 U. S. 211 (1951).

Clayton 16 proceedings is not yet definitely settled.[14] While it would appear to this court that the Supreme Court's discussion of *in pari delicto* in *Perma Life Mufflers*, as noted above, is equally applicable to the defense of unclean hands in a Clayton 16 action in the context in which that defense is here raised, it is not necessary for this court to reach that issue.

As appears from defendant's stated grounds for this defense, the alleged unconscionable acts on the part of the plaintiff do not arise out of anything involved in plaintiff's suit.

> "Courts of equity . . . apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks *in respect of the matter in litigation.* They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication." (Emphasis added.)[15]

Moreover, where, as here, a suit in equity concerns the public interest as well as the private interests of the litigants, the court is permitted to use its broadest discretion

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14. *Singer* v. *A. Hollander & Son* [1953 TRADE CASES ¶ 67,425], 202 F. 2d 55 (3 Cir. 1953); *Graham* v. *Triangle Publications* [1964 TRADE CASES ¶ 71,232], 233 F. Supp. 825 (E. D. Pa. 1964); and *Louisiana Petroleum Retail Dealers* v. *Texas Co.* [1956 TRADE CASES ¶ 68,566], 148 F. Supp. 334 (W. D. La. 1956). Cases contra are: *Hawaiian Tuna Packers* v. *International L. & W. Union* [1946-1947 TRADE CASES ¶ 57,587], 72 F. Supp. 562 (D. Haw. 1947); and *Magma Pictures Corp.* v. *Paramount Pictures Corp.*, 265 F. Supp. 144 (C. D. Cal. 1967).

15. *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, 245 (1933).

in the application of the maxim,[16] and the determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance.

Plaintiff's claim is limited to GT&E's acquisitions. The facts pleaded by defendant's answer to support its defense of unclean hands do not relate "to misconduct in relation to the matter in litigation. . . ."[17] Therefore, even if the court felt that the plaintiff was guilty of misconduct, since that misconduct does not affect the equitable relations between the parties in respect to the issue posed for adjudication by the court, the defense of unclean hands has no application here. If plaintiff is also a violator of the antitrust laws, defendant's remedy lies in recourse to a separate proceeding (as is set forth in defendant's counterclaim).

The same result is reached with regard to defendant's fourth affirmative defense under the Hawaii antitrust law for the reasons stated in re defendant's Third Affirmative Defense.

Plaintiff's Motion to Strike The Second, Third and Fourth Affirmative Defenses of Defendant General Telephone & Electronics Corporation is Granted. Plaintiff will prepare the necessary Order.

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16. *Precision Co.* v. *Automotive Co.*, 324 U. S. 806, 815 (1945). *Cf.* also *Graham* v. *Triangle Publications*, *supra* note 14, at 832, where Judge Higginbotham said:

> "Although the Third Circuit has in the past honored the defense in a private suit for injunction instituted under the antitrust laws (*Singer* v. *A. Hollander* . . . [*supra*]) it did not rely on the defense as the sole reason for dismissing the suit. If the unclean hands defense was the most persuasive argument for denying an injunction which should otherwise issue I would be inclined to hold under the facts and circumstances of this case that it would not be enough to thwart relief." (Footnote omitted.)

17. *Hoehn* v. *Crews*, 144 F. 2d 665, 672 (10 Cir. 1944), *cert. denied* 323 U. S. 773 (1944).

APPENDIX H

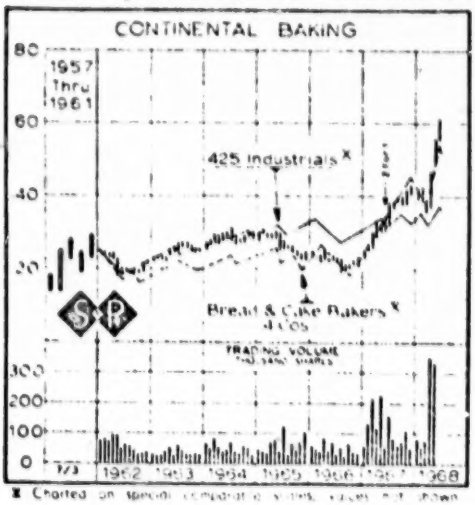
Appendix H

CI¹ 638

Continental Baking

Stock--	Approx. Price	Dividend	Yield
COMMON	58⅛	?---	?---
$5.50 PREFERRED	85½	?---	?---

RECOMMENDATION: This company and International Telephone & Telegraph Corp. have signed an agreement of merger under which, subject to approval of Continental's shareholders, Continental would become a wholly owned subsidiary of ITT. Terms call for the issuance of 0.72 common share of ITT and 0.25 share of ITT convertible preferred stock for each Continental common share. In addition, ITT would issue one share of its $5.50 non-convertible preferred stock for each share of Continental's $5.50 preferred.



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MERGER AGREEMENT

On June 12, 1968, International Telephone & Telegraph Corp. and Continental Baking announced jointly the signing of a merger agreement under which Continental would become a wholly owned subsidiary of ITT.

The proposed transaction is subject to approval of shareholders of the baking company and also to the fulfillment of "certain legal considerations."

The agreement is for ITT to issue 0.72 common share and 0.25 share of $4 cumulative convertible preferred, Series K, for each Continental Baking common share. The preferred so issued would be convertible into common at one share for $64 face value of preferred. In addition, ITT would issue one share of $5.50 non-convertible preferred stock for each share of Continental Baking's